Office - Supreme Court, U.S
FILED
MAY 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1229

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD JOHN LONGSTAFF, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

Attorneys for Petitioner:

Leonard Graff*
Donald C. Knutson
National Gay Rights
Advocates
540 Castro Street
San Francisco, CA 94114
(415) 863-9156

Jeff T. Appleman
Berry & Appleman
463 Pacific Avenue
San Francisco, CA 94133
(415) 398-1800

William O. Dillingham
Dillingham & Murphy
605 Market Street
The Penthouse
San Francisco, CA 94105
(415) 896-0400

Brian K. Bates
Tidwell & Associates
8131 LBJ Freeway
Suite 500
Dallas, TX 75251
(214) 699-9599

* Counsel of Record

I. PRELIMINARY STATEMENT.

This supplemental brief corrects a significant factual misstatement in respondent's brief in opposition to the petition for certiorari, and treats with respondent's eleventh hour attempt to eliminate by voluntary and selective cessation a plain and square conflict between the Fifth and Ninth Circuits. When all is said and done, certiorari should be granted to resolve the continuing enforcement problems presented by INS's ad hoc policy changes.

II. RESPONDENT'S SUGGESTION THAT PETITIONER "VOLUNTEERED" INFORMATION IS UNTRUE.

Although respondent represents to the Court that petitioner "volunteered the information [regarding prior homosexual experience]" and would have the Court believe that petitioner has brought the sanctions of denial of citizenship and possible deportation upon himself, the record is clear that petitioner never voluntarily disclosed his sexual orientation. Rather, he resisted such inquiry by the Immigration and Naturalization Service (hereinafter "INS") and admitted to some homosexual experience only after the INS "wanted to know everything" and had reminded petitioner that he had "a burden in these proceedings." Respondent states to the Court:

> "Petitioner suggests (Pct. 12) that if homosexuals may be excluded on the basis of their own admission, 'aliens entering the United States as tourists can be labeled "homosexual," "insane," or "mentally retarded," without the medical certificate required by the Act[.]' This suggestion, however, ignores the most salient fact of this case, and distorts the

> enforcement procedure currently employed by the INS for the exclusion of homosexual aliens. Petitioner has not been 'labeled "homosexual"' in some arbitrary or random fashion by the INS; his excludability on that ground is an issue only because he volunteered the information" [emphasis added] (Response No. 9, footnotes).

This statement is not only false, but when viewed in light of the record of proceedings of which respondent is in full and complete possession, it deceives the Court as to the actual means by which petitioner's alleged homosexuality became an issue.

Petitioner repeatedly and strenuously objected to all questions relating to his sexual preference and refused to answer such questions. Although not represented by counsel, petitioner steadfastly maintained that his sexual preference was a private matter and not the business of respondent. In pertinent part, the transcript of the preliminary examination, which took place at the INS offices in Dallas, Texas, on March 31, 1977 reads as follows:

> "Q: On January 13, 1977, you were interviewed by Mr. James A. Curry. Is that correct?
>
> "A: That's correct.
>
> "Q: When Mr. Curry interviewed you, he asked you if you had ever had any homosexual experience or something to that affect. What did you tell him?
>
> "A: Well, I denied it. I didn't feel he had the right to ask me this question. It wasn't on the application form. I also felt I had my own moral standards of conduct and therefore, I preferred to refuse to answer but since they wanted to know everything, finally I did answer that yes I have had some homosexual experience.
>
> "Q: I'd like to know something about the frequency of such actions or relationships or experiences. About how often would you say you have such an

experience?

"A: I prefer not to answer that questions.

"Q: Well, I do want to remind you that you do have a burden as I indicated before in these proceedings.

"A: I've told enough about my personal life already.

"Q: I want to make sure you know what the question is. You've already stated that you've had such experiences. Right?

"A: Yes.

"Q: The question is how often?

"A: I decline to answer that question.

"Q: Let me rephrase it. Would you say it's at least once every three months?

"A: No, I wouldn't like to answer that question.

"A: I feel I've given more than enough information. How could it possibly be relavent [sic] to my application to becoming an American citizen? Here again, I protest this line of questioning. I don't feel anybody has the right to peak [sic] through my bedroom curtains.

"Q: Well, we're certainly not trying to peak [sic] through your bedroom curtains and I'm not asking for any of the lurid details, I'm only asking you a simple question...

"A: You're asking about my sex life, that's what you're asking.

"Q: Not of you [sic] sex life but of your homosexual activities.

"A: This is the same thing as sex.

"Q: Would you be willing to give an estimate of the number of experiences that you've had during the last five years?

"A: No, I would not" (pp. 9- 11).

Respondent's characterization of petitioner's statements as "voluntary" admissions within the meaning of respondent's current "enlightened" guidelines ("unsolicited, unambiguous oral or written admission of homosexuality" (Pet. 12)) is simply an untrue representation to this Court.

III. RESPONDENT'S SELECTIVE, AD HOC CHANGE OF POLICY CURES NOTHING.

Similarly, the eleventh hour bureaucratic maneuvering by Acting Deputy Attorney General Jensen cannot resolve the dispute between the Ninth and Fifth Circuits. On June 13, 1979, Carl Hill, a British subject, carrying a valid visitor's visa, attempted to enter the United States at San Francisco International Airport. Mr. Hill wore a button containing the statement "Gay Pride." As a result, INS officers sought to have Mr. Hill examined by a PHS psychiatrist and certified as being afflicted with "a psychopathic personality or sexual deviation." Mr. Hill filed an action against the PHS to enjoin a statutorily unauthorized, non-medical examinations, of the type Mr. Jensen and respondent now seek to implement in the Ninth Circuit. On June 26, 1979, the United States District Court for the Northern District of California entered a temporary restraining order against the PHS (see Hill v. Richmond (N.D.Cal. 1979) Civil No. 79-1405 S.A.W.). By stipulation that order was continued until trial, which was set for August 13, 1979. On August 2, 1979, in

response to Mr. Hill's case, the Surgeon General directed PHS physicians to cease performing examinations and issuing certificates where the alien was suspected solely of being homosexual per se. The Surgeon General's directive mooted Mr. Hill's case.

Respondent suggests that Mr. Jensen's letter will cause the Public Health Service (hereinafter "PHS") to violate the Surgeon General's August 2, 1979 directive, the clear direction of Congress embodied in statute and the ethics of the medical profession. Respondent is naive. Moreover, if respondent believes the courts would permit the resumption of these examinations, respondent seriously underestimates the courts' commitment to due process of law and their antagonism towards INS's willingness to change its policies from Circuit to Circuit and case to case as suits its purposes. It is a policy "shell game" that will repeat itself until review is granted. It is time to bring INS to book.

If, on the other hand, respondent knows that Mr. Jensen's letter will not cause the resumption of the examinations, then petitioner submits that the letter is merely a subterfuge to mislead this Court into believing that there is no significant conflict between the Circuits and that there is no need to examine the conduct of an agency that arrogates to itself

the right to make law when the express directives of Congress become inconvenient or unsatisfactory.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard Graff
Attorneys for Petitioner

Leonard Graff*
Donald C. Knutson
National Gay Rights
Advocates
540 Castro Street
San Francisco, CA 94114
(415) 863-9156

William O. Dillingham
Dillingham & Murphy
605 Market Street
The Penthouse
San Francisco, CA 94105
(415) 896-0400

Jeff T. Appleman
Berry & Appleman
463 Pacific Avenue
San Francisco, CA 94133
(415) 398-1800

Brian K. Bates
Tidwell & Associates
8131 LBJ Freeway
Suite 500
Dallas, TX 75251
(214) 699-9599

* Counsel of Record